

No. 8116

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IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

LAU HU YUEN, alias LAU CHOCK WAH, <i>Appellant,</i>
VS.
UNITED STATES OF AMERICA, <i>Appellee.</i>

APPELLEE'S PETITION FOR A REHEARING.

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APPELLEE'S PETITION FOR A REHEARING.

To the Honorable Curtis D. Wilbur, Presiding Judge, and to the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Comes now the United States of America, Appellee in the above entitled cause, by its attorneys, and respectfully petitions this Honorable Court to rehear said cause; and as grounds believed by it to warrant a rehearing directs the Court's attention to the following matters of law and fact which the Court is deemed to have inadvertently overlooked.

I.

The Court mistakenly (Decision, par. 11) assumed that the two (2) witnesses who testified before the

Board of Special Inquiry on the Appellant's behalf in 1923, had, in November 1934,—when questioned by an Immigration Inspector—admitted error in asserting in 1923 Lau Hu Yuen's Hawaiian birth. (R. 78.) The record does not warrant that inference, and being contrary to the fact, these two (2) individuals were not in 1935 available as witnesses for the Government. Had they been made Government witnesses, the Government would have been precluded from attempting to impeach their veracity by inconsistent statements, except on the ground of surprise, in which event the impeachment could have no effect other than to offset their testimony at the trial itself. (*Sullivan v. U. S.* (C. C. A. 9), 28 F. (2d) 147.) These two (2) individuals were in 1935 the Appellant's witnesses and he failed to call them to his aid, though, as the Court correctly points out (Decision, par. 12), their recorded 1923 testimony was "inferior evidence to what they might have testified in the trial in 1935."

Fong Lum Kwai vs. U. S., 49 F. (2d) 19, 23 (1931);

Hung You Hong vs. U. S., 68 F. (2d) 67, 69 (1933).

II.

The Court mistakenly (Decision, par. 18) assumed that it was incumbent upon the Government to prove that the Tam Shee who died on June 13, 1898, was not the Appellant's mother.

The record shows (R. 136) that the Appellant and his two (2) 1923 witnesses (R. 25, 27) exclusively

claimed the Tam Shee who died on June 19, 1899, to have been his mother, and the Court grants that the Government proved that that person was not Appellant's mother.

Further, in this same connection, the Record shows (R. 90) that the Tam Shee who died on June 13, 1898 of "*fever*" was then thirty-one years of age, and was buried in Pauoa Cemetery, whereas Lau Hu Yuen testified (R. 134-137) and the Record shows (R. 88, 90) that the Tam Shee who Lau Hu Yuen claimed was his mother and who died on June 19, 1899, was thirty-eight (38) years of age at her death; that she died of tuberculosis; and that she was buried in Manoa Cemetery.

In connection with the identity of Lau Hu Yuen's mother, the Court's attention is further directed to the fact that his two (2) witnesses before the Board of Special Inquiry stated that the Tam Shee who was Lau Hu Yuen's mother died "K S -25, the 5th month" (R. 25, 27), said Chinese date corresponding to *June 19, 1899*.

From Lau Hu Yuen's testimony that his mother's remains arrived in China March 30, 1917 (R. 134)—the precise date upon which Disinterment Permit No. 572 was issued in Honolulu for the remains of the Tam Shee who died June 19, 1899 (R. 89, 90)—the Court mistakenly assumed (Decision, par. 22, 23, 26) it to have been incumbent upon the Government to prove that such remains were not those of the Tam Shee who died in Honolulu June 13, 1898. The Court inadvertently overlooked the fact that nowhere does

the Record disclose that Lau Hu Yuen, or anyone in his behalf, claimed that the Tam Shee who died June 13, 1898 was his mother; but on the contrary, the Record shows (R. 25, 27, 128, 137) a consistent claim by and on behalf of Lau Hu Yuen that the Tam Shee who died June 19, 1899, was his mother.

III.

The Court inadvertently (Decision, par. 20) considered immaterial Lau Hu Yuen's own testimony before the Board of Special Inquiry as to the identity of his mother. Not only is this kind of pedigree hearsay accepted by Courts as having probative value, but also as Boards of Special Inquiry are not curtailed by the strict rules of evidence the Court erred in deeming the Board of Special Inquiry to have attached no weight to Lau Hu Yuen's testimony that his mother was the Tam Shee who died June 19, 1899 of tuberculosis and who was buried in Manoa Cemetery. The Court's attention is invited to the especial value of pedigree testimony which emanates from a person who has the greatest interest in the world to be correctly informed as to his mother and who is a member of a race of people who revere and worship their ancestors.

U. S. v. Wong Gong, 70 F. (2d) 107 (1934);

Mui Sam Hun v. U. S., 78 F. (2d) 612, 616 (1935);

Yep Suey Ning v. Berkshire, 73 F. (2d) 745, 747 (1934).

IV.

The Court states (Decision, par. 3) that "Appellant had two sons and the uncontradicted evidence later adduced at the trial showed the two sons still living." Again in paragraphs 6, 12, 15, the Court mentions "two sons." All that the Record shows (R. 20, 21) is that in 1923 Lau Hu Yuen stated that he had two sons in China. In the 1935 trial no other evidence pertained to the two sons, and neither the Board of Special Inquiry's nor the District Court's decision touched upon the Appellant having two sons. The Record does not indicate the continued existence of these two sons nor their claim to United States citizenship through Lau Hu Yuen.

V.

The Court overlooked its previous Decisions to the effect that when the Government has discharged its burden of going forward with the evidence to rebut the Defendant-Appellant's prima facie case, the Defendant-Appellant must meet and discharge the statutory burden defined by Section 3 of the Act of May 5, 1892 (8 U. S. C. A. 284) and it is submitted that not only did the Government's evidence of "fraud," "irregularity" and "improvidence" rebut the prima facie correctness of the Board of Special Inquiry's determination, and that the weight of this rebutting evidence is not open to review by the Appellate Court, but that the Defendant-Appellant thereafter failed to discharge his burden of affirmatively proving to

the satisfaction of the Court his lawful right to remain in the United States.

Lum Man Sing v. U. S., (1928) 29 F. (2d) 500, 501, 502;

Dong Ling v. U. S., 30 F. (2d) 65, 66 (1929);

Leong Kwai Yin v. U. S., 31 F. (2d) 738, 739 (1929);

U. S. v. Chin Nun Gee, 45 F. (2d) 225, 226 (1930).

See also other cases cited in Appellee's Brief pp. 18-20.

Wherefore, upon the foregoing grounds, it is respectfully urged that this Petition for Rehearing be granted and that the Judgment of the United States District Court for the Territory of Hawaii, upon further consideration, be affirmed.

Dated, Honolulu, T. H., this 3rd day of September, A. D. 1936.

UNITED STATES OF AMERICA,

Appellee,

By INGRAM M. STAINBACK,
United States Attorney,
District of Hawaii,

J. FRANK McLAUGHLIN,
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CERTIFICATE OF COUNSEL

I, Ingram M. Stainback, United States Attorney for the District of Hawaii, of counsel for the United States of America in the above named cause, do hereby certify that the foregoing Petition for Rehearing of this cause is presented in good faith and not for delay.

INGRAM M. STAINBACK,
United States Attorney,
District of Hawaii,

*Attorney for Appellee
and Petitioner.*

Due service and receipt of a copy of the foregoing Petition for Rehearing is hereby admitted this 4th day of September, A. D. 1936.

E. J. BOTTS,
Attorney for Appellant.

